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IN THE

Supreme Court of the United States

OCTOBER TERM—1971

NO. ~~1719~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,
v.
WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENTS' REPLY TO PETITIONERS' BRIEF FILED AUGUST 4, 1971

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IN THE

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OCTOBER TERM—1971

NO. 1712

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' REPLY TO PETITIONERS' BRIEF FILED AUGUST 4, 1971

Claiming First Amendment protection, Petitioners insist that the activities which Respondents charge they have engaged in, i.e., the filing of false and perjured nominations in order to lower Respondents' allowables, cannot constitute a basis for an antitrust action. Petitioners ignore

the basic difference between activities seeking to influence programs and policies of government or its agencies charged with the duties to enact regulations pursuant to law and the filing of false and perjured nominations before such agency, not to influence a change of policy or regulation, but pursuant to a conspiracy and monopoly or attempt to monopolize for the express purpose of subverting such regulations in order to injure Respondents in their business and property. These are the glaring distinctions which Petitioners' able counsel in their advocatory zeal refuse to recognize.

As Judge Ingraham so well put it in this very case, 36 F.R.D. 107 at Page 111:

> "If the defendants were enjoined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any Constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from undertaking certain joint business behavior. To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr."

And as further noted by Judge Ingraham:

> "If, after a trial, the conspiracy were established and relief were granted, any order of the Railroad Commission would still stand."

Additionally, the Texas Courts charged with the duty of interpreting and passing upon the validity of the laws

dealing with precisely the same question and between the same parties have held that Respondents' pleadings alleging violation of the Texas Antitrust Law by reason of Petitioners filing of false nominations state a cause of action under the applicable laws. *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 382 S.W.2d 343 (1964) writ ref. n.r.e.

In the state court case, as here, Petitioners insisted that their filing of false and perjured nominations were for the purpose of influencing governmental action of such commission in fixing gas production allowables which they argued, as a matter of law, cannot constitute a violation of the Texas Antitrust Statute or form the basis or subject matter of an antitrust damage action, relying, as they do here, on Noerr and Okefenokee. The Texas Court, as did the Fifth Circuit, rejected their contention, citing Continental Ore and others. Once the difference between:

1. Subversion of the effects of the proration formula by filing false production and market forecasts; and

2. Attempts to influence the establishing or changing the rules or regulations, or the enactment of laws, are understood it becomes clear that [1] is not protected activities and [2] is. Only [2] may not form the basis of an antitrust action. This is precisely what Noerr and Pennington teaches.

The First Amendment does not provide the same degree of protection to commercial activities, especially when such activities are tainted by perjured and false nominations, that it does attempts at political persuasion. *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); *Breard v. City of Alexandria,* 341 U.S. 622, 641-643, 71 S.Ct. 920, 95 L.Ed. 1233 (1951);

and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1970). Cert. denied 400 U.S. 850, 91 S.Ct. 54.

This is in line with the holding of the Texas Courts and the specific provisions of Section 13, Article 6049 V.A.T.C. dealing with the conservation of petroleum, oil and natural gas and the duties of the Railroad Commission, which sets out that nothing in the regulatory scheme enacted by the legislature regulating the oil and gas industry, shall in any manner affect, alter, diminish, change or modify the antitrust and/or monopoly statutes of this state, etc. Art. 6049a, Sec. 8bb; Art. 6049d, Sec. 13; and Art. 6049e, Sec. 19 of Vernon's Texas Civil Statutes. Appendix (in Respondents' Reply to Petitioners' Application for Writ of Certiorari, page 19).

The fact that the Ninth Circuit in *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, cited Judge Singleton's opinion in the case at bar, 284 F.Supp. 582, is of no great persuasion. Under the clearly stated facts by the Fifth Circuit, after careful examination of the factual posture as portrayed in 3,457 pages of testimony and full briefs by the parties in interest approved Judge Ingraham's holding in 36 F.R.D. at page 111. See also *George R. Whitten, Jr. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (C.A. 1st Cir. 1970) Note 8.

The distinction sought to be made by the Petitioners in seeking to differentiate between the basic principles set out by *Walker Process Equipment v. Food Machine & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, and in the case at bar is a distinction without a difference. In both cases the gravamen of the offense was fraud and deceit and in both cases such deceit nullified the claimed pro-

tection under the First Amendment and their insulation against the antitrust laws. In order to prosecute their cause of action in this case Respondents were not required, nor could they, call this wrong to the attention of the Railroad Commission; *Foree v. Crown Central Petro. Corp.*, 431 S.W.2d 312 (Tex. S.Ct. 1968). The Texas Court has held that Plaintiffs' allegations as to perjured nominations stated a cause of action under the antitrust laws. *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 382 S.W.2d 343.

In *Trucking Unlimited,* supra, there are two questions which do not exist in the case at bar:

1. Whether agreements to utilize judicial and administrative adjudicative processes justify immunization against antitrust violations when

2. Unaccompanied with allegations that Defendants' presentations to the governmental agencies and the Court were in themselves false, misleading or lacking in evidentiary or legal support. Not so in the case now before this Court.

Respondents in this action do not seek the thousands of dollars spent by them to answer the numerous unwarranted actions instituted by Petitioners against them before the Railroad Commission nor the courts, nor have Petitioners alleged or sought to prove such actions as a basis for antitrust violations. Respondents' cause of action as to the perjured nominations are limited to the losses sustained by Respondents by reason of the subversion of such rules pursuant to Petitioners' antitrust activities.

It is respectfully submitted that the opinion of the Court of Appeals is clear and explicit and needs no further clarification from any of the parties to this litigation.

Briefly, the Court of Appeals sets out the remaining and unresolved issues as follows. Whether Petitioners, pursuant to the jury found antitrust violations, filed false nominations and if so, what damages, if any, Respondents sustained. During the trial of such issues Petitioners will have full opportunity to prove, if they can, that Respondents did not suffer any damages and/or they produced more gas than Petitioners would have produced had Respondents filed honest nominations. The parties stipulated that there was no waste, that is, no gas produced by Respondents was produced for unlawful purposes (R. 1991). All other matters contained in Petitioners' reply have previously been fully dealt with in both Petitioners' Application for Writ and Respondents' reply.

Finally, Petitioners, as in their Application for Writ of Certiorari in this Court reiterate their complaint of the Appellate Court's action in reinstating the verdict on:

1. The loss of the pipe line contract; and

2. The ordering of a trial on the issue of damages flowing from Petitioners' claimed conduct with regard to the extraction plant.

As to [1]—The issue has been clearly dealt with by the Court of Appeals and presented to this Court in Petitioners' Application for the Writ and Respondents' Reply in Opposition.

As to [2]—Petitioners' interference with Respondents' contract, pursuant to the conspiracy is actionable both under *Martin v. Phillips Petroleum Company,* 365 F.2d 629, where even under Louisiana Law, under the facts in this case, a cause of action exists as part of the antitrust violation, and under Texas Law. *Clements v. Withers,* 437 S.W.2d 818 (S.Ct. of Tex. 1969). There can be no question that a cause of action has been asserted.

CONCLUSION

Petitioners, who after a long trial consuming more than one month having been found in violation of the Antitrust Laws of the United States seek a second bite at the apple. The decision of the Court of Appeals is sound and in accordance with established law. Respectfully this case does not call for a review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served, on the 23rd day of August, 1971, on Messrs. Vinson, Elkins, Searls & Smith, First City National Bank Building, Houston, Texas 77002, attorneys for Petitioners by placing the same in a properly addressed envelope, postage prepaid, and depositing the same in the United States mail.

Arthur J. Mandell

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